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IN THE

Supreme Court of the United States

CURTIS A. BEASLEY,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Table of Authorities i
Reply Brief For The Petitioner 1
Conclusion 12

TABLE OF AUTHORITIES

Cases

Gall v. United States, No. 06-7949, slip op. 6 (Dec. 10, 2007) 12

Harris v. United States, 149 F.3d 1304 (11th Cir. 1998) 2

In re Sealed Case, 488 F.3d 1011 (D.C. Cir. 2007) 10

Michael v. Ghee, 498 F.3d 372 (6th Cir. 2007) 4

United States v. Cruz, 156 F.3d 22 (1st Cir. 1998), *cert. denied*, 526 U.S. 1124 (1999) 10

United States v. Ellis, 326 F.3d 593 (4th Cir. 2003), *cert. denied*, 540 U.S. 907 (2003) 6

United States v. Frisby, 258 F.3d 46 (1st Cir. 2001) 10

United States v. Galloway, No. 94-3173, 1995 WL 329242 (6th Cir. May 31, 1995) 4

United States v. Gibson, 434 F.3d 1234 (11th Cir. 2006), *cert. denied*, 126 S. Ct. 2911 (2006) 10

United States v. Labonte, 520 U.S. 751 (1997) 8, 9

United States v. Lejarde-Rada, 319 F.3d 1288 (11th Cir. 2003) 6

United States v. MacKinnon, 401 F.3d 8 (1st Cir. 2005) 10

United States v. Ramirez, 501 F.3d 1237 (11th Cir. 2007) 2, 3, 7

United States v. Rice, 43 F.3d 601 (11th Cir. 1995) 5

United States v. Rogers, 228 F.3d 1318 (11th Cir. 2000) 10

United States v. Thompson, 473 F.3d 1137 (11th Cir. 2007) 3

United States v. Weaver, 905 F.2d 1466 (11th Cir. 1990) 5

United States v. Windley, 2000 U.S. App. LEXIS 15440, No. 99-4574 (4th Cir. June 30, 2000) 10

Statutes and Guidelines

21 U.S.C. § 851(a) ..... *passim*

U.S.S.G. 4B1.1 ..... 1, 3

U.S.S.G. app. notes 1

REPLY BRIEF FOR THE PETITIONER

Every court of appeals to consider the question has held that 21 U.S.C. § 851(a) forbids the imposition of an enhanced sentence unless prosecutors provide notice to the defendant before jury selection. The United States, moreover, does not dispute the correctness of that rule. Here, the district court violated the statute, but the Fourth Circuit refused to correct the error. That ruling is the subject of two conflicts in the circuits. First, the court of appeals' decision is in acknowledged conflict with the Eleventh Circuit concerning whether a violation of Section 851(a) is jurisdictional and non-waivable. Second, given the uniform line of out-of-circuit authority, other courts of appeals would reject the Fourth Circuit's holding that the error could not be "plain." Because the case presents an ideal vehicle to resolve both conflicts and the government's arguments against review fail, certiorari should be granted.

1. There is no dispute that the government violated Section 851(a) by failing to give petitioner notice of the sentencing enhancement prior to jury selection. But the court of appeals refused to correct the error on the ground that it was waived. In so holding, the court acknowledged that its decision squarely conflicted with the law in the Eleventh Circuit. Pet. App. 4a.

The United States acknowledges the split, but contends that it is possible that the Eleventh Circuit will reverse course. BIO 13. Perhaps – but only if the Eleventh Circuit were to overthrow more than a decade of consistent precedent. "The Eleventh Circuit and its predecessor court have *unambiguously* and

repeatedly held that a district court lacks jurisdiction to enhance a sentence unless the government strictly complies with the procedural requirements of § 851(a)." *Harris v. United States*, 149 F.3d 1304, 1306 (11th Cir. 1998) (emphases added; citing additional cases).

The government suggests that the Eleventh Circuit could reverse course based on general jurisdictional rulings by this Court. But none of those decisions involves Section 851(a) or even a closely analogous statute. More importantly, the Eleventh Circuit recently reconfirmed its rule that the application of Section 851(a) is jurisdictional and non-waivable, notwithstanding this Court's "general" jurisdictional rulings in other areas. BIO 14 n.7; *United States v. Ramirez*, 501 F.3d 1237, 1239 (11th Cir. 2007).

The government's assertion that the issue was not presented in *Ramirez* is mistaken. In *Ramirez*, the Eleventh Circuit specifically "construe[d] the notice requirement of 21 U.S.C. § 851(a)(1)." 501 F.3d at 1238. The government had provided an untimely notice under Section 851(a), *see* 501 F.3d at 1239 n.3, and the defendant raised no objection. The district court nonetheless held that the violation "deprived it of jurisdiction to impose the enhanced sentence," and the Eleventh Circuit unqualifiedly agreed. *Id.* at 1239-40. "We have held that the notice requirement is jurisdictional: unless the government strictly complies, the district court lacks jurisdiction to impose

the enhanced sentence." *Id.* at 1239 (citing Eleventh Circuit cases).[1]

Ramirez hardly stands alone. In *United States v. Thompson*, 473 F.3d 1137 (2007), the Eleventh Circuit reconfirmed that Section 851(a) is jurisdictional and non-waivable. "The requirements of § 851 are not precatory; they must be followed in order for the § 841 enhancements to be applied." 473 F.3d at 1144. The court squarely held that a late-filed notice "has no effect" and noted that, under that circuit's precedent, "the government does not suggest otherwise." *Id.* at 1145.

2. Certiorari should also be granted because this case squarely presents a second circuit conflict, with still greater significance for the administration of federal criminal law, concerning whether a uniform line of out-of-circuit authority may itself render an error "plain."

The government suggests that the Court should not resolve that plain-error question because the law concerning the untimeliness of notice under Section 851 is not uniform in other circuits. That is wrong. Five circuits have held, and two circuits have strongly suggested, that notice is untimely under Section 851(a) if not provided prior to jury selection. *See* Pet. 11-12. Moreover, neither the Fourth Circuit in its opinion nor the government in its brief questions the correctness of that rule. There is no con-

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[1] The court of appeals went on to address the proper application of Section 851(a) despite the defendant's waiver, and it upheld the sentence only because the government had previously filed another, timely notice under another case number before re-indicting the defendant. *Ramirez*, 501 F.3d at 1240.

trary precedent in other circuits. The government notes that the Sixth Circuit's rules would permit parties to cite to its unpublished decision in *United States v. Galloway*, No. 94-3173, 1995 WL 329242 (6th Cir. May 31, 1995). True enough, but the fact that an unpublished decision may be *cited* (as may, for example, a district court decision), does not make it *precedential* and thus *Galloway* does nothing to disrupt the actual uniformity of circuit *law*. *E.g.*, *Michael v. Ghee*, 498 F.3d 372, 382 n.6 (6th Cir. 2007) ("unpublished decisions are not precedentially binding under the doctrine of *stare decisis*").

The further proposition that "the Sixth Circuit could well follow *Galloway* in a published decision in the future" (BIO 18) is not only exceedingly unlikely, given the uniformly contrary decisions of other circuits, but is also irrelevant because the question presented here is whether the district court's error was plain given the state of circuit law *as it stands now*. The government also says that the Section 851(a) information "may have been [filed] after voir dire had begun" in *United States v. Rice*, 43 F.3d 601, 603-04 (11th Cir. 1995). BIO 17. But the opinion contains no such suggestion and, in any event, the question was not presented in that case. *See also United States v. Weaver*, 905 F.2d 1466, 1481 (11th Cir. 1990) (notice timely when provided prior to jury selection).

Notwithstanding that the district court's decision departed from uniform circuit court precedent, the Fourth Circuit held that the error *could not* be plain. Pet. App. 10a. As the petition demonstrated, other courts of appeals have held the opposite, a fact that

the government does not dispute. Pet. 13-15. The question, moreover, is important and could recur with respect to myriad federal criminal law issues.

The government now maintains that a court of appeals may, but need not always, deem an error plain on the basis of out-of-circuit authority. BIO 14. The government also does not dispute that other courts of appeals have repeatedly held that out-of-circuit decisions establish plain error. *See* Pet. 13-15. But the government never comes to grips with the fact that the law in the Eleventh and now Fourth Circuits is directly to the contrary. Those courts hold that, if any ambiguity in the legal question can be identified, "there *can be no plain error* where there is no precedent from the Supreme Court or this court directly resolving" the issue. Pet. App. 10a (emphasis added). *See also* Pet. 13 (citing Eleventh Circuit authority).

The government's suggestion that this is just an intra-circuit conflict overlooks the Eleventh Circuit's holding that uniform out-of-circuit authority cannot establish plain error. Pet. App. 9a (citing *United States v. Lejarde-Rada*, 319 F.3d 1288 (11th Cir. 2003). And this case is an appropriate vehicle to resolve that conflict.

The government also errs in arguing that the Fourth Circuit would find plain error based solely on other circuits' decisions. It is undisputed that the Fourth Circuit has never done so. The Fourth Circuit's decision in *United States v. Ellis*, 326 F.3d 593 (4th Cir. 2003), *cert. denied*, 540 U.S. 907 (2003), simply acknowledged in *dictum* that other courts' decisions might sometimes be "pertinent." *Id.* at 597. Likewise, *United States v. Neal*, 101 F.3d 993, 998

(4th Cir. 1996), uttered the same *dictum* and, even then, only when this Court's precedent dictated the result. Thus, at best, the Fourth Circuit is willing to consider out-of-circuit authority only when its own precedent and that of this Court already support the defendant, but do not definitively "settle[]" the outcome. *Neal*, 101 F.3d at 998.

Finally, the government's argument that petitioner cannot establish the remaining plain-error requirements is wrong. The district court's failure to require a timely notice under Section 851(a) subjected petitioner to a significantly higher sentence. Not surprisingly, no court has endorsed the government's extraordinary contention that its own violations of the law can be ignored because Congress intended drug dealers to serve long sentences and, thus, the failure to provide notice will never "adversely affect the public perception of judicial proceedings." BIO 20.

That argument also wrongly assumes that Congress adopted a categorical notice requirement for no reason. In fact, timely notice serves two distinct purposes. First, "it allows the defendant to contest the accuracy of the information." It also affords the defendant "ample time to determine whether to enter a plea or go to trial and plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *Ramirez*, 501 F.3d at 1239. The failure to provide the required notice thus directly implicates the "integrity" as well as the "fairness" of the proceedings. *Johnson v. United States*, 520 U.S. 461, 470 (1997).

3. Finally, the government's assertion that, because petitioner's sentence rests on the career offender Sentencing Guideline, the question presented makes no difference in this case, is not only wrong, but also rests critically on a reading of the Guideline that has been rejected by this Court and numerous circuits. Because the government misunderstood the clear meaning of the sentencing guidelines, we treat the issue at length.

The career offender guideline (§ 4B1.1) provides that a covered defendant's "criminal history category * * * shall be Category VI" and "the table in this section" shall provide the defense level (unless a higher offense level otherwise applies). U.S.S.G. 4B1.1(b). The table, in turn, determines the offense level according to the defendant's "Offense Statutory Maximum." The Guideline's Application Note defines the "Offense Statutory Maximum" as "the maximum term of imprisonment authorized for the offense of conviction that is a * * * controlled substance offense, including any increase in that maximum term under a sentencing enhancement provision." As relevant here, if the maximum is life imprisonment, the offense level is 37; if the maximum is between twenty-five years and life, the offense level is 34.

The government's argument seems to assume that the "Offense Statutory Maximum" is the highest sentence hypothetically applicable to a case, without regard to whether the government complies with the procedural requirements of Section 851(a). That is not correct, and the government notably cites no authority for its contrary position. In a case (such as this one) in which the defendant's sentence can be

enhanced only if the government complies with the procedures dictated by Section 851(a), the government's failure properly to file the required notice precludes application of the higher offense level.

The Solicitor General's position, in fact, is in the teeth of *United States v. Labonte*, 520 U.S. 751 (1997), which held that a predecessor application note to the career offender guideline – providing that the Offense Statutory Maximum is set by the maximum *unenhanced* sentence – was contrary to the directive of 28 U.S.C. § 994(h) to enact a guideline providing for a sentence "at or near the maximum term authorized." This Court held that the "maximum" must be determined by the sentence applicable after enhancements, including (*if* the government complies with Section 851(a)) the enhancement authorized by that statute: "Thus, for defendants who have received the notice under § 851(a)(1), as respondents did here, the 'maximum term authorized' is the enhanced term. *For defendants who did not receive the notice, the unenhanced maximum applies.*" *Labonte* at 759-60 (emphasis added). See also *id.* at 761-62 (rejecting argument that allowing the guideline to be determined by the filing of the Section 851(a) notice leaves too much power in the hands of prosecutors on the ground that "[s]uch discretion is an integral feature of the criminal justice system").

In the wake of *Labonte*'s controlling construction of the governing statute, the courts of appeals have consistently held that the applicable offense level under Section 4B1.1 depends on whether the government properly provides the required notice:

> The offense level of 37 results from a combination of the career offender guideline, which assigns level 37 when the maximum statutory sentence is life, *id.* § 4B1.1, and the relevant statute, 21 U.S.C. § 841(b)(1)(B), which authorizes a maximum sentence of life for anyone who distributes five grams or more cocaine base and who has a prior felony drug conviction. *The defendant correctly points out that the statutory life sentence applies only if, before trial, the government files "an information with the court * * * stating in writing the previous convictions to be relied upon." Id. § 851(a)(1).*

In re Sealed Case, 488 F.3d 1011, 1017 n.3 (D.C. Cir. 2007) (emphasis added). *See also, e.g., United States v. Gibson*, 434 F.3d 1234, 1241, 1252 (11th Cir. 2006), *cert. denied*, 126 S. Ct. 2911 (2006); *United States v. MacKinnon*, 401 F.3d 8, 9 (1st Cir. 2005); *United States v. Rogers*, 228 F.3d 1318, 1321 (11th Cir. 2000); *United States v. Cruz*, 156 F.3d 22, 30 (1st Cir. 1998), *cert. denied*, 526 U.S. 1124 (1999). Notably, the Fourth Circuit has reversed a sentence on precisely that basis. *United States v. Windley*, 2000 U.S. App. LEXIS 15440, No. 99-4574 (4th Cir. June 30, 2000).

The government relies on *United States v. Frisby*, 258 F.3d 46 (1st Cir. 2001), for the proposition that, "[w]hen a defendant is sentenced as a career offender under Sentencing Guidelines § 4B1.1 and the sentence falls within the unenhanced statutory range, the government does not have to file a Section 851(a)(1) information at all." BIO 8. That is a correct

and unexceptional statement *if* the statutory maximum triggered by the Section 851(a) notice has not been used to raise the defendant's offense level under the guideline. But *Frisby* is quite clear that when the guideline offense level *does* depend on the enhancement authorized under Section 851(a), the higher offense level does not apply if notice is not properly provided. See 258 F.3d at 51 ("If the government had filed a § 851 information, Frisby's maximum prison term under 21 U.S.C. § 841 would have risen from 20 to 30 years. *See* 21 U.S.C. § 841(b)(1)(C). Based on this enhanced statutory maximum, Frisby's career offender base offense level would have risen from 32 to 34.").

In this case, because the government did not comply with Section 851(a) – a point it does not deny – petitioner's correct offense level under the guideline was not 37 (the level applicable to an enhanced maximum term of life imprisonment), but instead was 34 (the level applicable to the unenhanced maximum term of forty years). Contrary to the government's argument (BIO 7), the Fourth Circuit did not "assume[]" that result. The issue received considerable attention at oral argument. And then, in its opinion, the Fourth Circuit specifically recognized that the application of the guideline itself turned on the validity of the Section 851(a) notice:

> After conviction and during sentencing, the district court assumed that the § 851 information had been timely filed, and, based on Beasley's prior felony convictions, enhanced Beasley's sentence. *Thus*, Beasley was subject to a maximum of life imprisonment under §

> 851(b)(1)(B), *and* his offense level as determined by U.S.S.G. § 4B1.1, was 37, yielding a recommended sentencing range of 360 months' to life imprisonment. The district court sentenced Beasley to 408 months' imprisonment and, as mandated by § 841(b)(1)(B), to 8 years of supervised release. *In the absence of an increased sentence*, the Sentencing Guidelines would have recommended a sentence in the range of 262 to 327 months' imprisonment and 5 years' supervised release.

Pet. App. 4a (emphases added).[2] Accordingly, this case presents an appropriate vehicle to decide the questions presented.

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[2] The government notes in passing that the district court indicated (albeit without any explanation or elaboration) that it would have imposed a still higher sentence if not bound by the guideline range. See BIO 4. But when it said that, the district court was operating under the doubly erroneous view that (i) petitioner's criminal history category was 37 rather than 34, which is a very significant difference in sentencing terms, and that (ii) petitioner was subject to a statutory term of life imprisonment. There is no reason to assume that the court would have adhered to that view if the error were corrected. If the district court believed that a sentence on the higher end of the range was appropriate (as suggested by the comment cited by the government), then it is critical that the district court misunderstood what the range was, given this Court's directive that a district court "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Gall v. United States*, No. 06-7949, slip op. 6 (Dec. 10, 2007).

CONCLUSION

For the foregoing reasons and those set out in the Petition for a Writ of Certiorari, certiorari should be granted.

Respectfully Submitted,

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